Nos. 83-997, 83-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Petitioner,

v.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C. A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND TRANS WORLD AIRLINES, INC.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF AIR LINE PILOTS ASSOCIATION, INTERNATIONAL
Respondent in No. 83-997

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QUESTIONS PRESENTED

1. Whether a defendant-employer may assert the EEOC's claim for damages under the Age Discrimination in Employment Act ("ADEA") against a defendant-union, notwithstanding that the EEOC has not sought review of the judgment that the defendant-union is not liable for damages, has opposed the defendant-employer's assertion of the EEOC's damages claim, and has stated that it will seek complete recovery of damages from the defendant-employer?

2. Whether a joint violator of the ADEA has a right to shift a portion of the damages which may be obtained against it to a codefendant union (*i.e.*, secure contribution) where the EEOC no longer seeks damages against the union; if so, whether the Court should consider that claim where it was asserted for the first time by petition for certiorari?

3. Whether, in the absence of a damages remedy against labor unions in the comprehensive remedial scheme of the Fair Labor Standards Act ("FLSA") as incorporated in the ADEA, the EEOC may secure monetary relief against a defendant-union for jointly violating the ADEA with an employer?

4. Whether the EEOC may secure liquidated damages against a union for violating the ADEA?

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PRELIMINARY STATEMENT

Air Line Pilots Association, International ("ALPA"), petitioner in No. 83-1325 and respondent in No. 83-997, respectfully submits this brief on the merits as respondent in No. 83-997.

STATUTES INVOLVED

Pertinent provisions of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219, and of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e-2000e-17, are set forth in the Supplemental Appendix, annexed hereto.

STATEMENT OF THE CASE

ALPA filed a brief in these consolidated cases as petitioner in No. 83-1325. The Statement of the Case in that brief describes TWA's employment of flight deck crew members and the procedural history of this case (ALPA Br. as Petitioner at 4-7), and will be repeated or enlarged only as relevant to the present brief.

A. TWA's Retirement Practices

For approximately twenty years, TWA retired all flight deck crew members (captains, first officers, international relief officers and flight engineers) at age 60. The 1978 amendments to the ADEA, effective April 6, 1978, eliminated a bona fide employee benefit plan defense to mandatory retirement at age 60. Pub. L. No. 95-256, § 2(a), 92 Stat. 189 (1978).

In August, 1978, TWA unilaterally decided to permit flight engineers to continue in their jobs past age 60, but to retain its policy of retiring captains and first officers when they reached age 60, J.A. 425, because they were subject to the FAA Age 60 Rule, 14 C.F.R. § 121.383(c), which is a bona fide occupational qualification ("BFOQ") under § 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1). TWA Br. at 28 n.35. TWA determined that it could allow flight engineers to serve past age 60 because, in its view, they were not subject to a BFOQ, and § 4.2 of the collectively bargained pilot retirement plan provided that any crew member could serve past the normal retirement date (age 60) with "written approval of the company." J.A. 243, 410.

In implementing its August, 1978 policy, TWA routinely permitted captains who successfully bid for flight engineer positions in order to serve past age 60 to postpone training past the effective date of the bid, so that they could work as captains until age 60. J.A. 59. All other crew members were scheduled for training so as to be qualified for a new position as close as possible to the effective date of their bids. *Id.* In early 1980 TWA modified its practice to require captains who downbid in order to serve past age 60 to fulfill their bids in the same timely manner as other crew members.[1]

On July 25, 1979, ALPA and TWA signed a collective bargaining agreement ("Agreement"), effective August 1,

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[1] At a meeting in January, 1980, ALPA representatives suggested that the practice of treating captains approaching age 60 more favorably than other pilots was contrary to the collective bargaining agreement. At some time after that meeting, TWA began to require downbidding captains to enter training on the same basis as other crew members. J.A. 1069. As a result of this change, captains who successfully bid for flight engineer positions were scheduled to begin training one to four months prior to age 60. J.A. 765-6. The deposition of Joseph C. Hilly, TWA Vice-President, Labor Relations, which is the only evidence in the record concerning TWA's decision to require downbidding captains to fulfill their bids in a timely manner, indicates that Mr. Hilly could not recall whether or not this change in TWA's practices was a result of the meeting with ALPA: "It just so happened that our reading of the agreement coincided on that possibility." J.A. 1071.

While the Court of Appeals concluded that "the evidence is undisputed that ALPA caused TWA to institute the requirement that successful downbidders 'fulfill their bids in a timely manner,' resulting in the cancellation of bids awarded three downbidding EEOC plaintiffs . . .," A-32, only *two* plaintiffs reached age 60 after January 1980 (H.W. Lewis, 11/24/80; D.V. Roquemore, 8/21/81). TWA Br. at 13 n.16. Moreover, plaintiffs never claimed that the "timely manner" policy resulted in the cancellation of bids, but rather asserted that this change caused *successfully* downbidding captains to lose "pay and responsibility, in contrast to the 1979 situation when virtually all downbidders were permitted to complete their full careers as captains." Appellants' Br. at 18, Court of Appeals, Nos. 82-6266, 6280, 6306.

1979, which superseded the prior agreement in effect July 20, 1977 to July 31, 1979. J.A. 147, 337-38. Section 4.2 of the retirement plan was retained in the 1979 Agreement. A-32. Neither party had proposed any modification of § 4.2 in the 1979 negotiations. J.A. 158.

B. Decision of the Court Below

The Court of Appeals held that "ALPA is liable under 29 U.S.C. § 623(c)(3) to the *EEOC plaintiffs* who were damaged by its conduct." A-33 (emphasis added). In a footnote, the court explicated the basis for its decision: "ALPA's actions in signing the post-1978 Working Agreements and in causing TWA to implement other restrictions on the downbidding older captains and flight engineers render it liable under § 623(c)(3). . . ." A-33 n.19. The court's reference to "other restrictions" was to the requirement that downbidding captains "fulfill their bids in a timely manner." A-32.[2]

With respect to the subject EEOC plaintiffs, the Court of Appeals held that "the remedial scheme of the ADEA,

[2] As the effective date of the "post-1978 Working Agreement" was August 1, 1979, and the requirement to "fulfill . . . bids in a timely manner" was not implemented until after January, 1980, the court's holding that ALPA is liable "to the EEOC plaintiffs who were damaged by its conduct" refers to the three EEOC plaintiffs who reached age 60 on or after August 1, 1979. (The retirement dates of the three individual and seven EEOC plaintiffs are set forth in TWA's Br. at 13 n.16. All three individual plaintiffs, and four EEOC plaintiffs, reached age 60 and were terminated in accordance with TWA's unilateral August, 1978 policy on or before November 10, 1978).

While the court below also noted that "ALPA actively campaigned to persuade TWA to retain its age-60 retirement policy for all flight deck crew positions, [and] opposed TWA's unilateral action in August 1978 to attempt partial compliance with the ADEA," it did not find that these *unsuccessful* attempts caused injury to plaintiffs, nor could it have so found by summary judgment where the record contained statements by TWA management that ALPA played no role in the formulation of the August, 1978 policy. J.A. 1005A, 1050-52.

which incorporates that of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219; *Lorillard* v. *Pons*, 434 U.S. 575 (1978), does not permit actions to recover monetary damages, including backpay, against a labor organization." A-38.

C. Position of the Parties before this Court

TWA seeks to present the question of a union's monetary liability for a violation of the ADEA in the event that this Court affirms the judgment of the court below that TWA and ALPA jointly violated the ADEA as to certain EEOC claimants. Prior to its petition for certiorari, TWA had not asserted that ALPA should bear any part of the monetary liability which might result from the application of its August, 1978 policy: TWA did not file a cross-claim against ALPA, or otherwise allege in its answers that ALPA was responsible for any injuries caused by its policies, J.A. 74, 91, 99, nor did TWA raise this issue in opposing plaintiffs' request for summary judgment on appeal.

While individual plaintiffs originally sought to obtain "backpay and any other pecuniary loss or amounts owing them by defendants," plus liquidated damages, J.A. 68, and the EEOC sought to require "[d]efendants TWA and ALPA to pay appropriate back wages, and an equal sum as liquidated damages. . . ," J.A. 97, all plaintiffs elected *not* to file conditional cross-petitions to seek review of that aspect of the Court of Appeals judgment that the ADEA does not permit recovery of "monetary damages, including backpay, against a labor organization."[3] Rather, plaintiffs made the tactical decision to forgo review by this Court and instead seek recovery of damages only

[3] Individual plaintiffs also declined to appeal from the judgment holding ALPA liable only to "EEOC plaintiffs." TWA does not contest this aspect of the judgment. Accordingly, the only issue posed by TWA relates to potential damages to certain EEOC claimants.

from TWA. EEOC Br. in Opp. to TWA Pet. for Cert. in No. 83-997, at 19 n.16; Thurston Br. in Opp. to TWA Pet. for Cert. in No. 83-997, at 10.

SUMMARY OF ARGUMENT

Unless this Court reverses the summary judgment finding ADEA violations, TWA will be subject to "total monetary liability." TWA Br. at 44. Not wishing to be "stuck" with this liability, *id.*, TWA asks the Court to rule that ALPA should also pay damages—even though the EEOC, representing members of the class for whose benefit the ADEA was enacted, has decided not to seek damages from ALPA and is bound by an unappealed judgment limiting the EEOC claimants to damages from the employer.

TWA plainly may not assert the EEOC's rights; even if it could, it would still be seeking only an advisory opinion, since the EEOC is bound by the judgment below. Nor should the Court consider whether TWA has a right to have ALPA pay damages, since that issue was neither presented to nor considered or decided by the courts below.

TWA is in no different a position than any other joint violator "stuck" for all of the damages, who asserts that it is unfair that plaintiff has recovered, or will recover, full relief from him alone. This type of claim by a joint violator, whatever the stage of litigation at which it is made, merely asserts a right of contribution. The Court in *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77 (1981), held that neither Title VII nor the Equal Pay Act, 29 U.S.C. § 206(d) ("EPA"), authorized an employer to "compel the union to share the responsibility for a joint violation of a third party's rights." 451 U.S. at 93. Since the remedial provisions of the ADEA, like those of the EPA, are adopted from the FLSA, and the ADEA's substantive prohibitions are

drawn from Title VII, TWA plainly has no right to contribution under the ADEA.

Finally, as the FLSA provides no damages remedy against labor organizations, and the ADEA does not modify those provisions of the FLSA, the court below correctly ruled that the EEOC has no right to obtain damages from ALPA. The EEOC cannot in any event secure liquidated damages under the ADEA. The judgment limiting the EEOC to securing monetary relief against TWA should be affirmed.

ARGUMENT

I. TWA HAS NO RIGHT TO ASSERT THE EEOC'S CLAIM FOR DAMAGES OR OTHERWISE COMPEL ALPA TO SHARE ITS FINANCIAL RESPONSIBILITY.

Two distinct issues are encompassed in the question presented by TWA: 1) whether the *EEOC* may secure damages from ALPA; and 2) whether *TWA* may compel ALPA to share its financial responsibility, where the EEOC has decided to seek its damages from the employer alone. These issues are wholly separate: if, as an abstract proposition, the EEOC may secure a money award from unions under the ADEA, that does not determine whether TWA as a joint violator could compel ALPA to pay. *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 88-89 & n.20, 92 n.25 (1981). TWA may not assert plaintiffs' claims. TWA's claim was not presented below and has no basis in the ADEA. The Court should not disturb a judgment denying union liability for money damages to EEOC claimants which has not been appealed by the EEOC.

A. The EEOC's Claim for Damages against ALPA Is Not Properly before the Court.

Insofar as TWA seeks to hold ALPA responsible for injuries to EEOC claimants, only the EEOC may assert

their claim for damages.[4] The EEOC agrees: "[T]he proper parties to seek further review of this issue would be [plaintiffs], the ones who were injured by ALPA's discriminatory conduct." EEOC Br. in Opp. to TWA Pet. for Cert. at 19. Since plaintiffs have not done so, TWA's "claim should be rejected." *Id.*

TWA seeks an advisory opinion beyond the power of the Court. In the event that TWA may be unable to answer to the total judgment against it, the Court of Appeals judgment denies the EEOC any recourse against ALPA. As the EEOC filed no cross-petition to reverse this adverse aspect of the judgment, it is bound by the judgment, and may not, as a respondent, seek to enlarge its rights on appeal.[5] A decision here that unions may be subject to damages under the ADEA could have no subsequent effect in this proceeding; lacking effect, it would be advisory.[6]

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[4] *See, e.g., Capital Cities Cable, Inc.* v. *Crisp*, —— U.S. ——, 52 U.S.L.W. 4803, 4805 n.6 (U.S. June 19, 1984); *Beebe* v. *Highland Tank and Manufacturing Co.*, 373 F.2d 886, 890 (3d Cir.), *cert. denied*, 388 U.S. 911 (1967); *Webb* v. *Beverly Hills Federal Savings & Loan Association*, 364 F.2d 146, 149 (9th Cir. 1966); *Norton* v. *Lindsay*, 350 F.2d 46, 48 (10th Cir. 1965); *Hamilton Trust Co.* v. *Cornucopia Mines Co.*, 223 F. 494 (9th Cir. 1915). As the court stated in *Hamilton Trust Co.*, "the right or title which appellant seeks to establish must be his own and not that of a third person." 223 F. at 499.

[5] *See, e.g., United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Brennan* v. *Arnheim & Neely, Inc.*, 410 U.S. 512, 516 (1973); *Swarb* v. *Lennox*, 405 U.S. 191, 201 (1972); *Le Tulle* v. *Scofield*, 308 U.S. 415, 421-22 (1940); *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191-92 (1937); *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924); *The Maria Martin*, 79 U.S. (12 Wall.) 31, 40, 41 (1870).

[6] *See, e.g., Linda R. S.* v. *Richard D.*, 410 U.S. 614 (1973) (decision regarding enforcement of criminal support law would be purely advisory since imprisonment of delinquent father would not affect petitioner's rights); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976) (absent showing that

B. TWA Has No Right to Compel ALPA to Share Responsibility for Damages under the ADEA.

TWA complains that it should not be "stuck with total monetary liability," TWA Br. at 44, although the EEOC has decided that it is better served by seeking its monetary remedies from the employer alone. TWA's claim is simply another formulation of a request for contribution from a joint violator. TWA asserts that right for the first time here, and has, in any event, no statutory right to shift damages.

1. *TWA's belated effort to shift damages to ALPA should not be considered.*

The issue of TWA's right to shift damages was not raised, considered or decided in the courts below. TWA did not assert a cross-claim against ALPA in its answers nor otherwise plead that any injury alleged by plaintiffs was a result of conduct by ALPA. J.A. 74, 91, 99. When it opposed plaintiffs' request for summary judgment in the Court of Appeals, TWA did not claim that any portion of the damages should be recovered from ALPA rather than TWA. TWA Br. as Appellee, No. 82-6266. The issue is raised here for the first time in the entire course of this litigation.[7]

This Court "will not ordinarily consider" issues "neither raised before nor considered by the Court of Appeals." *Adickes* v. *S.H. Kress and Co.*, 398 U.S. 144, 147

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the injury may be redressed by a favorable decision, decision by a federal court would be "gratuitous and thus inconsistent with Art. III limitations.")

[7] TWA has consistently taken the position that the pilot collective bargaining agreement did *not* require retirement at age 60. A-14. TWA argues that it required captains to retire at age 60 because they were subject to the FAA Age 60 Rule, a BFOQ under § 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1). TWA Br. at 28 n.35. As petitioner in No. 83-1325, ALPA argues that TWA's decision was authorized by § 4(f)(1) of the ADEA.

n.2 (1970).[8] It is only in "exceptional circumstances" that the Court departs from this rule. *See Capital Cities Cable, Inc.* v. *Crisp*, —— U.S. ——, 52 U.S.L.W. 4803, 4805 (U.S. June 19, 1984); *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958). TWA has argued that it was not necessary to file a cross-claim, or, in the alternative, that a cross-claim could be asserted under Fed. R. Civ. P. 15, "even after judgment." TWA Reply Br. in Support of Pet. for Cert. at 5 n.**. If the discretionary rule of this Court not to consider issues neither raised nor decided in the courts below could be circumvented by the possibility of a subsequent amendment of the pleadings, it would cease to exist.[9] TWA has not explained why it waited until after judgment to assert a cross-claim, or, indeed, offered any reason why its claim against ALPA should be initially considered by this Court.

2. *TWA has no right to shift damages.*

TWA's effort to shift damages should in any event be rejected. This Court has held that an employer has neither a federal statutory nor common law right under either the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d), or Title VII "to compel [a] union to share responsibility for a joint violation of a third party's rights." *Northwest Airlines*, 451 U.S. at 93. The Court in *Northwest Airlines* ruled that neither the language of the referenced statutes, nor their structure and legislative histories, supported an implied damages remedy by employers against unions, and that it would be improper for federal courts to add such a remedy to comprehensive legislative schemes

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[8] *See also United States* v. *Santana*, 427 U.S. 38, 41 n.2 (1976); *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967); *California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957).

[9] In *Foman* v. *Davis*, 371 U.S. 178 (1962), on which TWA relies, TWA Reply Br. in Support of Pet. for Cert. at 5 n.**, the issue concerning post-judgment amendment of the pleadings had been raised in and decided by the Court of Appeals. 371 U.S. at 182.

which included integrated remedial and enforcement procedures. Although *Northwest Airlines* was a separate lawsuit for contribution by an employer held liable for monetary relief under Title VII and the EPA,[10] it applies with equal force to the present case where TWA seeks, by writ of certiorari, to shift damages under the ADEA.

In *Northwest Airlines*, the Court assumed that all the elements of a contribution claim had been established and that the policies of the EPA and Title VII supported a right to contribution. 451 U.S. at 88-90.[11] Nonetheless, no right to shift damages could be implied from the statutes since employers are not "members of the class for whose especial benefit either the Equal Pay Act or Title VII was enacted." 451 U.S. at 92. Moreover, the "comprehensive character of the [applicable] remedial scheme expressly fashioned by Congress," and the silence of each statute's legislative history, strongly argued against a Congressional intent to create additional remedies. 451 U.S. at 93.

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[10] *See Laffey* v. *Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973), *aff'd in part, vacated in part*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

[11] Those elements being: (1) that the union was "at least partially responsible" for the proven statutory violations; and (2) that the plaintiffs "could have asserted a claim for monetary relief against their unions" under the EPA and Title VII. *Northwest Airlines*, 451 U.S. at 88-89 & n.20.

Since this Court assumed that the unions in *Northwest Airlines* were also responsible for the proven EPA and Title VII violations, the Court of Appeals' finding here that ALPA was partially responsible for the alleged ADEA violations is not a basis to distinguish *Northwest Airlines*. For the same reason, TWA's policy arguments—the same noted in *Northwest Airlines*—are equally unavailing. *Compare* TWA Br. at 39-41 with *Northwest Airlines*, 451 U.S. at 89 n.21.

In *Lorillard* v. *Pons*, 434 U.S. 575 (1978), the Court described the ADEA as a "hybrid" statute, incorporating, with a few express modifications, the procedures, remedies and enforcement mechanisms of the FLSA, 434 U.S. at 578-79, and the substantive prohibitions of Title VII, *id.* at 584. The EPA was enacted as an amendment to the FLSA, and, like the ADEA, adopts the remedial, procedural and enforcement mechanisms of the FLSA. 29 U.S.C. § 206(d)(3). Whether one looks to the remedial scheme of the ADEA, adopted from the FLSA, or its substantive provisions, modeled after Title VII's prohibitions, *Northwest Airlines* makes clear that a defendant has no right to compel a joint violator to pay damages under the ADEA.

Employers are no more members of the class for whose "especial benefit" the ADEA was enacted than they are beneficiaries of Title VII or the EPA. The legislative history of the ADEA is no less mute regarding the creation of employer remedies against codefendant unions than that of Title VII or the EPA.[12] There is thus no indication that Congress, in enacting the ADEA, intended to permit employers to shift their liability for damages to union codefendants. In view of the ADEA's comprehensive remedial scheme, it is no more appropriate for federal courts to create a new remedy for employer-defendants under ADEA than it is to do so under Title VII or the EPA. *See Northwest Airlines*, 451 U.S. at 97.

TWA argues that § 7(b) of ADEA, 29 U.S.C. § 626(b), which provides that a court "shall have jurisdiction to grant such legal or equitable relief as may be appro-

[12] The legislative history cited by TWA, Br. at 41, indicates only that ADEA's substantive prohibitions apply to unions as well as employers, which the statute expressly provides in 29 U.S.C. § 623(c) and (d). As both Title VII, 42 U.S.C. § 2000e-2(c), and the EPA, 29 U.S.C. § 206(d)(2), also prohibit union violations, this legislative history is irrelevant to the question whether employers may shift any of their monetary liability to unions.

priate to effectuate the purposes of this Act," permits a court to assess damages against a union as well as an employer. TWA Br. at 39-40. This language in § 7(b) does not provide any greater right to an employer to shift damages to the union than did analogous language in § 706(g) of Title VII[13] at issue in *Northwest Airlines*.[14] The power of a court to grant remedies under § 7(b) of the ADEA effectuates the statutory rights of plaintiffs; the ADEA does not impose any duty on a plaintiff to sue all potential defendants, nor does it authorize any one defendant to litigate plaintiff's claim for damages against a codefendant who successfully defeats that claim at any stage of the proceeding.

Whatever power a court may have to award monetary relief under the ADEA against all of the defendants from whom plaintiffs seek damages, there is no power,

[13] Section 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), authorizes the court under Title VII to order "such affirmative action as may be appropriate . . . or any other equitable relief as the court deems appropriate."

[14] In *Northwest Airlines*, the Court referred to the "broad power under § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), to fashion relief against all respondents named in a properly filed charge." 451 U.S. at 93 n.28. The Court's statement could only have referred to respondents who had been charged and whom plaintiffs had sued for damages; a mere respondent to a charge is not a defendant to a damages claim unless named and served in a court action. *See* 42 U.S.C. § 2000e-5(f)(1) (charging party may bring "civil action" against respondent). *Cf. Baldwin County Welcome Center* v. *Brown*, —— U.S. ——, 104 S.Ct. 1723 (1984) (Title VII action must be commenced by filing a timely complaint; plaintiff cannot rely on EEOC charge or filing notice of right to sue in federal court). The District Court in *Laffey* could not have found the union responsible for damages even if it had been a respondent to a charge, because plaintiffs chose not to sue the union, which was made a party to that litigation only to enable the court to implement complete injunctive relief. *See Northwest Airlines*, 451 U.S. at 81 n.5. Plaintiffs here have abandoned their claim for damages against ALPA, so that ALPA is now in precisely the same position in this case as the unions in *Laffey* and *Northwest Airlines*.

where the plaintiffs have abandoned their claim for damages against a defendant, to hold that defendant liable at the instance of another, unless the latter has a right of contribution. The procedural context in which a right to contribution is asserted cannot add to the substantive statutory rights which Congress has created. If there is no right to contribution in an independent action for contribution against a union, that right cannot be created by use of a third-party complaint, cross-claim, or, as in the instant case, by petition for writ of certiorari.[15]

Where liability is joint and several, it is settled that no defendant may compel a plaintiff to seek or enforce a monetary judgment from another potential or actual defendant.[16] Any violator is wholly liable without respect to the liability of others. Judgment against him is enforceable in full, whether or not plaintiff could secure or enforce a judgment against other persons. Since an appeal has no effect on the judgment against him, the ad-

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[15] *Separate action: Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77 (1981); *Anderson* v. *Local 3, International Brotherhood of Electrical Workers*, 582 F. Supp. 627 (S.D.N.Y. 1984), *appeal docketed*, No. 84-7384 (2d Cir. 1984).

Third Party Complaint: Germann v. *Pekow*, 531 F. Supp. 355 (N.D. Ill. 1981).

Joinder of indispensable party: Liberles v. *County of Cook*, 709 F.2d 1122 (7th Cir. 1983); *Marshall* v. *Eastern Airlines, Inc.*, 474 F. Supp. 364 (S.D. Fla. 1979), *aff'd on other grounds sub nom. EEOC* v. *Eastern Airlines, Inc.*, 26 Empl. Prac. Dec. (CCH) ¶ 32,122 (5th Cir.), *cert. denied*, 454 U.S. 818 (1981); *Atkinson* v. *Owens-Illinois Glass Co.*, 10 Fair Empl. Prac. Cases (BNA) 710 (N.D. Ga. 1975).

[16] *See, e.g., Lugar* v. *Edmondson Oil Co.*, 639 F.2d 1058, 1065 n.14 (4th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 457 U.S. 922 (1982); *In re Uranium Antitrust Litigation*, 617 F.2d 1248, 1257 (7th Cir. 1980); *Wylain, Inc.* v. *Kidde Consumer Durables Corp.*, 74 F.R.D. 434, 437 (D. Del. 1977). *See also* 3A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 19.11, at 19-233 to 234; (2d ed. 1984); RESTATEMENT (SECOND) OF TORTS §§ 875, 885(1), (2) (1977).

judicated joint violator simply has no appealable interest in the dismissal of other defendants, and *may not appeal* a judgment in favor of a codefendant.[17]

In this case TWA and ALPA were found liable for a joint violation of the ADEA. TWA Br. at 16, 38. Plaintiffs agree that defendants' liability under the FLSA, and hence, the ADEA, is joint and several. *See* EEOC Br. in Opp. to TWA's Pet. for Cert. at 19 & n.16 and cases cited therein; Thurston Br. in Opp. to TWA's Pet. for Cert. at 10 and n.14. The joint and several liability of joint violators of the FLSA was well established before the enactment of the ADEA in 1967,[18] and is no less

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[17] *See, e.g., Beebe* v. *Highland Tank and Manufacturing Co.*, 373 F.2d 886, 890 (3d Cir. 1967), *cert. denied*, 388 U.S. 911 (1967); *Webb* v. *Beverly Hills Federal Savings & Loan Association*, 364 F.2d 146, 149 (9th Cir. 1966); *Albert Miller & Co.* v. *Wilkins*, 209 F. 582, 585 (7th Cir. 1913); W. PROSSER, THE LAW OF TORTS, § 47, at 296-97 (4th ed. 1971). *Cf. Corsicana National Bank* v. *Johnson*, 251 U.S. 68, 89 (1919); *Contino* v. *Baltimore & Annapolis Railroad*, 178 F.2d 521 (9th Cir. 1949); RESTATEMENT (SECOND) OF TORTS, §§ 883, 885(1), (2); 3 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 14.11, at 14-64 to 67 (2d ed. 1984) and cases cited therein.

[18] *See, e.g., Wood* v. *Meier*, 218 F.2d 419, 420 (5th Cir. 1955); *Greenberg* v. *Arsenal Bldg. Corp.*, 50 F. Supp. 700, 704 (S.D.N.Y. 1943), *modified on other grounds and otherwise aff'd*, 144 F.2d 292 (2d Cir. 1944), *aff'd in relevant part sub nom. Brooklyn Savings Bank* v. *O'Neill*, 324 U.S. 697 (1945); *Mitchell* v. *Stewart Brothers Construction Co.*, 184 F. Supp. 886, 890 (D. Neb. 1960); *Goldberg* v. *Dix Box Co.*, 45 Lab. Cas. (CCH) ¶ 31,325, at 41,428 (S.D. Cal. 1962).

This principle continues to govern FLSA enforcement. *See, e.g., Donovan* v. *Agnew*, 712 F.2d 1508, 1511 (1st Cir. 1983); *Donovan* v. *Sabine Irrigation Co.*, 695 F.2d 190, 194-95 (5th Cir.), *cert. denied*, —— U.S. ——, 103 S.Ct. 3537 (1983); *Donovan* v. *Maxim Industries, Inc.*, 552 F. Supp. 1024, 1025 (D. Mass. 1982); *Altman* v. *Stevens Fashion Fabrics*, 441 F. Supp. 1318, 1321 (N.D. Cal. 1977); *Brennan* v. *Whatley*, 432 F. Supp. 465, 469 (E.D. Tex. 1977); *Marshall* v. *Keasling*, 82 Lab. Cas. (CCH) ¶ 33,562, at 47,936 (E.D. Mich. 1977); *Usery* v. *Godwin Hardware, Inc.*, 426 F. Supp. 1243, 1266 (W.D. Mich. 1976); *Wirtz* v. *Soft Drinks of Shreveport*,

incorporated in the ADEA than the right to a jury trial in a private action. *See Lorillard*, 434 U.S. at 581 (in enacting the ADEA, Congress is presumed to have been aware of the judicial interpretation given to the incorporated sections of the FLSA).[19] As a joint violator of the statute, TWA has no right to appeal dismissal of a codefendant. Whether or not the EEOC could secure damages from ALPA, TWA remains fully liable, and has no appealable interest in the ruling below that ALPA is not liable for monetary relief. Accordingly, TWA's petition concerning union liability must be denied.

II. THE ADEA DOES NOT AUTHORIZE MONETARY RELIEF AGAINST LABOR ORGANIZATIONS.

A. Congress Fully Incorporated into the ADEA the Remedial Scheme of the FLSA with Respect to the Recovery of Lost Wages and Benefits.

Section 4 of the ADEA expressly prohibits certain conduct by employers and labor organizations. These obligations are "enforced through express incorporation of the remedial rights and procedures of the [FLSA], rather than through independent ADEA remedies." *Kelly* v. *American Standard, Inc.*, 640 F.2d 974, 977-78 (9th Cir. 1981). Section 7(b) of the ADEA, 29 U.S.C. § 626(b), states that a prohibited act under § 4 of the ADEA "shall be deemed to be a prohibited act under Section 15" of the FLSA, 29 U.S.C. § 215, and further provides that "[t]he provisions of this chapter *shall* be enforced in accordance with the powers, *remedies*, and procedures provided in"

Inc., 336 F. Supp. 950, 958 (W.D. La. 1971). *But see EEOC* v. *Air Line Pilots Association, International*, 489 F. Supp. 1003 (D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981).

[19] The ADEA incorporates the remedial scheme of the FLSA, *Lorillard*, 434 U.S. at 583-85, and nothing in § 7(b) of the ADEA suggests that Congress intended in the ADEA to modify the FLSA rule of joint and several liability for a joint violation. *Id.* at 581-82.

sections 11(b), 16 (except § 16(a)) and 17 of the FLSA, and § 7(c) of the ADEA.[20] 29 U.S.C. § 626(b) (emphasis added).

In *Lorillard*, this Court determined that Congress intended to incorporate the "remedies and procedures of the FLSA" into the ADEA "'to the greatest extent possible. . . .'" 434 U.S. at 582, *quoting* 113 Cong. Rec. 31,254 (1967) (remarks of Sen. Javits, a floor manager of the bill). Indeed, the EEOC bases its position that defendants are jointly and severally liable for a joint ADEA violation on FLSA and Equal Pay Act cases. EEOC Brief in Opposition to TWA's Petition for Certiorari at 19 n.16. TWA also argues that the ADEA must be enforced in accordance with the FLSA as it stood when the ADEA was enacted. TWA Br. at 37 n.49. The lower federal courts have decided a broad range of remedial and procedural issues concerning the enforcement of the ADEA by reference to FLSA remedies and procedures.

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[20] Section 7(c) of the ADEA has been construed "to give individuals the ability to take advantage of the relief conferred in § 626(b)," but is *not* "an independent source of remedies under the statute." *Pfeiffer* v. *Essex Wire Corp.*, 682 F.2d 684, 685 n.1 (7th Cir.), *cert. denied*, 459 U.S. 1039 (1982). *See generally Lorillard* v. *Pons*, 434 U.S. at 581-82, 583 n.11; *Burns* v. *Equitable Life Assurance Society*, 696 F.2d 21, 23 (2d Cir. 1982), *cert. denied*, —— U.S. ——, 104 S.Ct. 336 (1983).

[21] *Class action procedures:*

See, e.g., La Chappelle v. *Owens-Illinois, Inc.*, 513 F.2d 286 (5th Cir. 1975).

Award of prejudgment interest:

Gibson v. *Mohawk Rubber Co.*, 695 F.2d 1093, 1102 (8th Cir. 1982); *Spagnuolo* v. *Whirlpool Corp.*, 641 F.2d 1109, 1114 (4th Cir. 1981); *Kelly* v. *American Standard, Inc.*, 640 F.2d 974, 982 (9th Cir. 1981).

Punitive Damages and Damages for Pain and Suffering:

See, e.g., Johnson v. *Al Tech Specialties Steel Corp.*, 731 F.2d 143, 147-48 (2d Cir. 1984); *Fiedler* v. *Indianhead Truck Line,*

Thus, "[i]n order to determine whether a union may be held liable to one of its members for his lost wages under the ADEA, it is necessary to determine whether a union would have such liability under the FLSA." *Neuman* v. *Northwest Airlines, Inc.*, 28 Fair Empl. Prac. Cases (BNA) 1488, 1490 (N.D. Ill. 1982). TWA concedes that unions are not subject to monetary remedies under the remedial scheme of the FLSA, but argues that "the selectivity in the FLSA should not be applied woodenly" under the ADEA in light of the "legal relief" authorized in § 7(b) of the ADEA, 29 U.S.C. § 626(b). TWA Br. at 40. However, as shown *infra*, at pp. 30-34, the language of § 7(b), as construed by this Court and the lower federal courts, does not provide an additional monetary remedy for labor organization violations of § 4 of the ADEA which was not provided in §§ 16 and 17 of the FLSA for labor organization violations of § 15 of the FLSA.

Inc., 670 F.2d 806, 810 (8th Cir. 1982); *Pfeiffer* v. *Essex Wire Corp.*, 682 F.2d at 686; *Naton* v. *Bank of California*, 649 F.2d 691, 699 (9th Cir. 1981); *Slatin* v. *Stanford Research Institute*, 590 F.2d 1292 (4th Cir. 1979); *Vazquez* v. *Eastern Airlines, Inc.*, 579 F.2d 107 (1st Cir. 1978); *Dean* v. *American Security Insurance Co.*, 559 F.2d 1036 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978).

EEOC Right to Jury Trial:

See EEOC v. *Corry Jamestown Corp.*, 719 F.2d 1219, 1223 (3d Cir. 1983). *Accord EEOC* v. *Brown & Root, Inc.*, 725 F.2d 348 (5th Cir. 1984).

Attorney's Fees:

Vocca v. *Playboy Hotel of Chicago, Inc.*, 686 F.2d 605 (7th Cir. 1982).

Termination of individual right of action following suit by the EEOC:

Burns v. *Equitable Life Assurance Society*, 696 F.2d 21.

Extraterritorial Application of the ADEA:

Cleary v. *United States Lines, Inc.*, 728 F.2d 607, 610 (3d Cir. 1984).

B. The FLSA Does Not Provide for Recovery of Damages Caused by Union Violations of § 15 of the FLSA.

The relevant substantive prohibitions of the FLSA may be briefly summarized. Sections 6(a), (b), (c), (e) and (f), 29 U.S.C. § 206(a), (b), (c), (e) and (f), require employers to pay their employees a minimum wage. Section 6(d) (the EPA) prohibits an employer from paying differing wages on the basis of sex, and prohibits labor organizations from causing or attempting to cause employers to discriminate on that basis.[22] Section 7, 29 U.S.C. § 207, regulates employer overtime compensation practices. Section 15(a)(2) makes it unlawful "for any person" to violate §§ 6 or 7, and § 15(a)(3) makes it unlawful "for any person" to retaliate against an employee for action relating to enforcement of the statute. 29 U.S.C. § 215(a)(2), (3). Thus, the FLSA governs the minimum wage and overtime practices of employers and the equal pay and retaliation practices of employers and labor organizations.

Four enforcement mechanisms are established. First, there are criminal sanctions under § 16(a) against "any person who willfully violates" any provision of § 15. 29 U.S.C. § 216(a). Second, an "employee" may bring an action under § 16(b) against "any employer" who violates §§ 6, 7, or 15(a)(3) (retaliation). 29 U.S.C. § 216(b). Third, the Secretary of Labor may bring an action under § 16(c) to recover amounts owing for violations of §§ 6 and 7. 29 U.S.C. § 216(c). Fourth, the "Administrator" may proceed under § 17 to restrain violations of § 15, including "the restraint of any withholding of payment of minimum wages or overtime compensa-

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[22] Section 6(d)(2), 29 U.S.C. § 206(d)(2), provides that "[n]o labor organization . . . shall cause or attempt to cause such an employer to discriminate against an employee in violation of" the equal pay provisions in § 6(d)(1) of the FLSA, 29 U.S.C. § 206(d)(1).

tion" due as a result of violations of § 15(a)(2). 29 U.S.C. §§ 211(a), 217.

Under this remedial scheme, an "employer" which violates § 6 or § 7 of the FLSA is subject to criminal sanctions under § 16(a), employee actions under § 16(b), Secretary of Labor actions under § 16(c), and injunction proceedings by the Administrator under § 17. While a labor organization is included in the definition of "person," FLSA § 3a, 29 U.S.C. § 203(a), the term "employer" expressly excludes a "labor organization (other than when acting as an employer)," FLSA § 3(d), 29 U.S.C. § 203(d). Remedies against labor organizations are therefore limited to criminal penalties under § 16(a) for willful violation of § 15, and § 17 actions to enjoin violations of § 15. There is no right of action under § 16(b) or § 16(c) against a labor organization "other than when acting as an employer;" there is no basis to seek recovery of "unpaid minimum wages and overtime compensation" under § 17 from a union co-signatory to a collective bargaining agreement which violates § 15(a)(2) of the FLSA.

1. ***The EEOC has no right of action against ALPA under § 16(c).***

Whether the EEOC may recover damages against ALPA under § 16(c) of the FLSA[23] turns on two questions of statutory construction: 1) whether the ADEA incorporates § 16(c) as it existed in 1967 or as subsequently amended in 1974; and 2) in any event, whether § 16(c) authorizes recovery of damages against labor organizations.

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[23] Section 16(b) actions may only be brought by an "employee." Only "[t]wo of the incorporated [FLSA] sections, FLSA §§ 16(c) and 17, apply to actions brought by the Secretary of Labor on behalf of aggrieved individuals" to enforce the ADEA. *EEOS* v. *Gilbarco, Inc.*, 615 F.2d 985, 988 (4th Cir. 1980).

a. ***FLSA § 16(c) must be construed as incorporated in the ADEA in 1967.***

ADEA was enacted in 1967. Pub. L. No. 90-202, 81 Stat. 602 (1967). At that time § 16(c) of the FLSA authorized the Secretary of Labor to bring an action, on behalf of an employee who had made a written request to the Secretary, to recover unpaid minimum wages and overtime compensation, but not liquidated damages. 29 U.S.C. § 216(c) (1964 ed.), *amended by* Pub. L. No. 93-259, § 26, 88 Stat. 55, 77 (1974). Section 16(c) further deprived the courts of jurisdiction in any action by the Secretary "involving an issue of law which has not been settled finally by the courts." *Id.* In 1974 Congress amended § 16(c) to delete the requirement of a written request and the limitation as to issues "settled finally by the courts", and authorized the Secretary to secure liquidated damages in § 16(c) actions. Pub. L. No. 93-259, § 26, 88 Stat. 55, 73 (1974).

In the 1967 enactment of the ADEA, Congress incorporated the remedial scheme of the then existing FLSA, except for certain express modifications in § 7(b) of the ADEA.[24] *See Lorillard*, 434 U.S. at 582. The incorporation of a statute in a subsequent enactment " 'has always been considered as referring to the law existing at the time of adoption, and no subsequent legislation has ever been supposed to affect it; and such must necessarily be

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[24] As enacted, § 7(b) states, in material part: "The provisions of this Act shall be enforced in accordance with . . . sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended. . . ." Pub. L. No. 90-202, § 7(b), 81 Stat. 602, 604 (1967). As codified, the references are to "sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title. . . ." 29 U.S.C. § 626(b). There is no express reference to the effect of subsequent amendments. *Cf. Pearce* v. *Director, Office of Workers' Compensation Programs*, 603 F.2d 763, 767 (9th Cir. 1979) (Defense Base Act, as originally enacted, incorporated the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950, "as amended, and as the same may be amended hereafter . . .").

the effect and operation of such adoption.'" *In re Heath*, 144 U.S. 92, 94 (1892), *quoting Kendall* v. *United States*, 37 U.S. (12 Pet.) 524, 625 (1838). *Accord Hassett* v. *Welch*, 303 U.S. 303, 314 (1938).[25]

As TWA states, Congress has not expressed an intent to incorporate the post-1967 amendments to § 16(c) into the ADEA. TWA Br. at 37 n.49. Thus the EEOC could have no right of action under § 16(c) against ALPA, since the issues presented to this Court concerning the lawfulness under §§ 4(a) and 4(f)(1) of the ADEA of a retirement policy such as TWA's were not settled finally by the courts when the EEOC intervened in this action.[26] Moreover, the EEOC cannot recover liquidated damages against ALPA since § 16(c) did not authorize such damages in an action by the Secretary until the 1974 amendment. Section 16(c), as incorporated in the ADEA, provides no right of action for damages against ALPA.

b. *Section 16(c) does not otherwise authorize recovery of damages against labor organizations.*

Even if Congress intended the 1974 amendment of the FLSA to be incorporated into the ADEA, § 16(c) still does not authorize recovery of damages against ALPA.

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[25] The Court in *EEOC* v. *Chrysler Corp.*, 546 F. Supp. 54, 73-78 (E.D. Mich.), *aff'd on other grounds*, 683 F.2d 146 (6th Cir. 1982), held that the 1974 amendments to § 16(c) were incorporated in the ADEA, based on its characterization of specific references to § 16 and § 17 of the FLSA as manifesting an intent "to incorporate the general FLSA enforcement scheme." Yet, the FLSA enforcement scheme is contained not only in § 16 and § 17 of the FLSA, but also in the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251-262. In *Lorillard*, the Court noted that "the ADEA expressly incorporates §§ 6 and 11 of the Portal-to-Portal Act, [but] ADEA does not make any reference to § 11, 29 U.S.C. § 260" (which creates a "good faith" exception to the liquidated damages authorized in §16(b) and § 16(c) of the FLSA). *See, e.g., Goodman* v. *Heublein, Inc.*, 645 F.2d 127, 129-30 (2d Cir. 1981) and cases cited therein (holding that the ADEA does not incorporate 29 U.S.C. § 260).

[26] *See, e.g., Wirtz* v. *Marino*, 405 F.2d 938 (1st Cir. 1968).

Section 16(c) does not create any right of recovery on behalf of an employee beyond the recovery he could obtain in his own action under § 16(b).

> [A]n employee who is not paid minimum wages or overtime . . . may choose between action by the Administrator under [§ 16(c)] for simply the amount which is owed to him and his own individual right of action under [§ 16(b)] for both back wages and liquidated damages together with a reasonable attorney's fee.

S. Rep. No. 640, 81st Cong., 1st Sess., *reprinted in* 1949 U.S. CODE CONG. & AD. NEWS 2241, 2249. "A suit under § 16(c), therefore, is essentially a representative action brought to enforce the private rights described in § 16(b)." *EEOC* v. *Corry Jamestown Corp.*, 719 F.2d 1219, 1221 (3d Cir. 1983). *See also Wirtz* v. *Jones*, 340 F.2d 901, 904 (5th Cir. 1965) ("[u]nder § 16(b) the employees may sue the employer for backpay, and under § 16(c) the Secretary . . . may bring the action").

Section 16(b) does not authorize an action against a labor organization. Although a union may violate § 15(a)(2) of the FLSA, by causing an employer to pay gender-discriminatory wages, § 16(b) only authorizes recovery of "unpaid minimum wages and overtime compensation" against an "employer." Under § 3(d) of the FLSA, the term "employer" "does not include any labor organization (other than when acting as an employer). . . ." Where a statute is unambiguous, the plain meaning of the statutory language governs. *See, e.g., INS* v. *Phinpathya*, —— U.S. ——, 104 S.Ct. 584, 589 (1984).

Thus, shortly after the enactment of the FLSA, the court in *Bowe* v. *Judson C. Burns, Inc.*, 137 F.2d 37 (3d Cir. 1943), held that § 16(a) of the FLSA (criminal sanctions) is applicable to a labor organization which

violates § 15(a)(3) (retaliation) because the latter provision is directed against "any person" (defined to include labor organizations, § 3(a), 29 U.S.C. § 203(a)). However, emphasizing that the FLSA is "carefully drawn and every term is used as a term of art," 137 F.2d at 38, the court noted that "[e]mployee actions may be maintained only under Section 16(b) to recover back wages and liquidated damages," *id.* at 39, and that § 16(b) "provides that an 'employer' who violates the wage and hour sections of the Act . . . shall be liable to the employee affected for unpaid wages and for damages." *Id.*

Every court to address the question has held that an employee injured by labor organization violations of § 15(a)(2) of the FLSA may not recover damages against labor organizations under § 16(b), based on the express terms of § 3(d) and § 16(b).[27] Prior to *Northwest Airlines*, 451 U.S. 77, the lower federal courts also rejected employers' claims for contribution from unions alleged to have jointly violated the EPA on the ground that § 16(b) of the FLSA does not authorize recovery of damages from unions.[28]

Whether or not the amendments to the FLSA subsequent to 1967 are deemed incorporated into the ADEA, they further demonstrate that Congress has at all times intended that damages under § 16 only be recovered from

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[27] *Lyon* v. *Temple University*, 507 F. Supp. 471, 474-75 (E.D. Pa. 1981); *Cook* v. *Mountain States Telephone and Telegraph Co.*, 397 F. Supp. 1219, 1226 (D. Ariz. 1975); *Hunter* v. *United Air Lines, Inc.*, 10 Fair Empl. Prac. Cases (BNA) 787, 788 (N.D. Cal. 1975); *Tuma* v. *American Can Co.*, 367 F. Supp. 1178, 1181 (D.N.J. 1973).

[28] *Denicola* v. *G.C. Murphy Co.*, 562 F.2d 889, 894 (3d Cir. 1977); *Wust* v. *Northwest Airlines, Inc.*, 86 Lab. Cas. (CCH) ¶ 33,811, at 48,805 (W.D. Wash. 1979). *Cf. Northwest Airlines, Inc.* v. *Transport Workers Union*, 606 F.2d 1350, 1355 (D.C. Cir. 1979), *aff'd in part and vacated in part*, 451 U.S. 77 (1981).

an "employer" and not a union.[29] Until 1974, § 16(b) provided that "[a]n action to recover such liability [referring to liability of an "employer" who violates §§ 6 or 7] may be maintained in any court of competent jurisdiction. . . ." *See, e.g.*, 29 U.S.C. § 16(b) (1970). In the 1974 amendments, Pub. L. No. 93-259, 88 Stat. 55 (1974), Congress modified that sentence to read that the action "may be maintained against any employer (including a public agency). . . ."[30] Congress did not provide any § 16(b) remedy against labor organizations which caused private employers or public agencies to violate the statute. *See Hunter* v. *United Air Lines, Inc.*, 10 Fair Empl. Prac. Cases (BNA) 787, 788 (N.D. Cal. 1975).

Until 1977, there was no private right of action under § 16(b) for retaliation in violation of § 15(a)(3). *See, e.g.*, 29 U.S.C. § 216(b) (1976). In the 1977 FLSA amendments, Pub. L. No. 95-151, 91 Stat. 1245 (1977), Congress modified § 16(b) to provide a private action for retaliation.[31] Congress limited the new § 16(b) legal and equitable remedies to a private right of action against "any employer" which unlawfully retaliates against employees, *id.*, although previous case law had

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[29] *See generally Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-81 (1969); *United States* v. *Stewart*, 311 U.S. 60, 64 (1940).

[30] The amended sentence of § 16(b) states: "[a]ctions to recover such liability may be maintained [against any employer (including a public agency)] in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves, and other employees similarly situated." (1974 additions in brackets). Pub. L. No. 93-259, § 6(d)(1), 88 Stat. 55, 61-62 (1974).

[31] The 1977 amendment to § 16(b) provides: "Any employer who violates the provisions of section 15(a)(3) of this Act shall be liable for such legal or equitable relief as may be apropriate to effectuate the purposes of section 15(a)(3), including without limitation employment, reinstatement, promotion and the payment of wages lost, and an additional equal amount as liquidated damages." Pub. L. No. 95-151 § 10, 91 Stat. 1245, 1252 (1977).

denied any private right of action for damages under § 16(b) or for injunctive relief under § 17 against either an employer or a labor organization which violated § 15 (a)(3) of the FLSA,[32] and recent decisions had construed "employer" not to apply to labor organizations.[33] This omission confirms that the absence of a right of action against unions under § 16(b) or § 16(c) was not inadvertent. *See generally Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981) (no right to a jury trial under § 15 of the ADEA, 29 U.S.C. § 633a [federal employment]; § 7(c)(2) of the ADEA "*expressly* provides for jury trials," "[b]ut in § 15 [Congress] failed explicitly to do so.").

2. *Section 17 does not provide a remedy to recover money damages against unions which enter into collective bargaining agreements embodying unlawful employment practices.*

Section 17 of the FLSA, 29 U.S.C. § 217, allows the Secretary to secure injunctions to restrain violations of § 15, 29 U.S.C. § 215. Section 17 was amended in 1961 to authorize "the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act. . . ." Pub. L. No. 87-30, § 12(b), 75 Stat. 65, 82 (1961). The language, legislative history, judicial construction and administrative enforcement of § 17 do not "disclose a purpose to make the union jointly liable in damages, but rather to give the Secretary of Labor power to enjoin violations of the [FLSA] where a union is responsible, as

[32] *See, e.g., Martinez* v. *Behring's Bearings Service, Inc.*, 501 F.2d 104 (5th Cir. 1974); *Powell* v. *Washington Post Co.*, 267 F.2d 651 (D.C. Cir.), *cert. denied*, 360 U.S. 930 (1959); *Bonner* v. *Elizabeth Arden, Inc.*, 177 F.2d 703 (2d Cir. 1949); *Bowe* v. *Judson C. Burns, Inc.*, 137 F.2d at 38-39; *Britton* v. *Grace Line Inc.*, 214 F. Supp. 295 (S.D.N.Y. 1962).

[33] *Cook*, 397 F. Supp. 1219, *Hunter*, 10 Fair Empl. Prac. Cases (BNA) 787, and *Tuma*, 367 F. Supp. 1178, were decided between 1973 and 1975; *Denicola*, 562 F.2d 889, was decided in 1977. *See supra* at p. 24 nn.27, 28.

well as power to enjoin employers from future violations and require payment for past ones." *Wirtz* v. *Hayes Industries, Inc.*, 1 Empl. Prac. Dec. (CCH) ¶ 9874, at 1090 (N.D. Ohio 1968).

> Because "employers," and not unions, can be liable to employees under the FLSA for unpaid minimum wages or overtime compensation, it follows that only "employers" are capable of wrongfully withholding such funds from employees. Therefore, only "employers" may be rstrained from engaging in such withholding.

Neuman v. *Northwest Air Lines, Inc.*, 28 Fair Empl. Prac. Cases (BNA) at 1490-91.

The legislative history of the 1961 amendments to § 17 demonstrates that Congress had two purposes for this enactment:

> First, the restraint was meant to increase the effectiveness of the enforcement of the Act by depriving a violator of any gains accruing to him through his violation. Second, the amendment was meant to protect those employers who comply with the Act from having to compete unfavorably with employers who do not comply. (Senate Report No. 145, 87th Cong., First Session. 1961; 1962 U.S. CODE CONG. & ADMIN. NEWS 1620 at 1658-1659).

Wirtz v. *Malthor, Inc.*, 391 F.2d 1, 3 (9th Cir. 1968).[34] Both of these Congressional purposes seek to redress the competitive advantage gained by an *employer* by engaging in violations of the Act. Neither presents a rationale for holding unions liable for back wages wrongfully withheld. Indeed, permitting the employer to shift any part of its liability to the union "would subvert the congres-

[34] *Accord Donovan* v. *Sovereign Security, Ltd.*, 726 F.2d 55 (2d Cir. 1984); *Donovan* v. *Brown Equipment and Service Tools, Inc.*, 666 F.2d 148, 156-57 (5th Cir. 1982); *Hodgson* v. *American Can Co.*, 440 F.2d 916 (8th Cir. 1971); *Marshall* v. *A & M Consolidated Independent School District*, 605 F.2d 186, 189 (5th Cir. 1979).

sional policies sought to be advanced." *Brennan* v. *Emerald Renovators, Inc.*, 410 F.2d 1057, 1061 (S.D.N.Y. 1975). *Accord EEOC* v. *Ferris State College*, 493 F. Supp. 707, 716 (W.D. Mich. 1980). Moreover, to construe § 17 to authorize recovery against unions for discriminatory policies embodied in collective bargaining agreements would create different economic risks for unionized and non-unionized employers who violate § 15 of the FLSA, as employees of unionized employers could proceed against the union for damages.[35]

The lower federal courts have routinely rejected contribution claims in § 17 actions by employer-defendants against unions which signed collective bargaining agreements that violate the equal pay provisions of the FLSA, because such claims are inconsistent with the language and purposes of § 17.[36] With a single exception, neither the Secretary of Labor nor the EEOC have brought § 17 actions against labor organizations to recover damages under the EPA or FLSA.[37] The principle that the Secre-

[35] *Cf. Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 710 (1945) (holding that employee waiver of liquidated damages claims were inconsistent with statutory goals of eliminating economic incentives for statutory violations: "An employer is not to be allowed to gain a competitive advantage by reason of the fact that his employees are more willing to waive claims for liquidated damages than are those of his competitors.").

[36] *EEOC* v. *Ferris State College*, 493 F. Supp. 707, 716-17 (W.D. Mich. 1980); *Marshall* v. *Tombs Janitorial Service, Inc.*, 82 Lab. Cas. (CCH) ¶ 33,559 (W.D. Mo. 1977); *Usery* v. *Beloit College*, 12 Empl. Prac. Dec. (CCH) ¶ 11,203 (W.D. Wis. 1976); *Dunlop* v. *Beloit College*, 411 F. Supp. 398 (W.D. Wis. 1976); *Brennan* v. *Emerald Renovators, Inc.*, 410 F. Supp. 1057 (S.D.N.Y. 1975); *Wirtz* v. *Hayes Industries, Inc.*, 1 Empl. Prac. Dec. (CCH) ¶ 9874 (N.D. Ohio 1968). *Cf. Murphy* v. *Miller Brewing Co.*, 307 F. Supp. 829 (E.D. Wis. 1969), *aff'd sub nom. Hodgson* v. *Miller Brewing Co.*, 457 F.2d 221 (7th Cir. 1972) (union agreement to labor contract containing sex-discriminatory provisions does not state a claim for violation of 29 U.S.C. § 206(d)(2)).

[37] The only reported case in which the Secretary sought to obtain a monetary remedy from a labor organization invoked the general

tary of Labor may obtain an injunction under § 17 against "any person" who violates the Act, but may only recover "unpaid wages and overtime compensation" from an "employer", has also been recognized outside the context of actions against labor organizations. In *Wirtz* v. *Pure Ice Co.*, 322 F.2d 259 (8th Cir. 1963), the court affirmed both the entry of an injunction against an owner of a corporation for violations of the FLSA, and the denial of a judgment for unpaid wages against him, based on a finding that the owner was not an "employer" within the meaning of § 3(d) of the FLSA, 29 U.S.C. § 203(d).

In any event, if § 17 were construed to authorize recovery of "unpaid minimum wages and overtime compensation" from both parties to a collective bargaining agreement, liquidated damages are not available in a § 17 ac-

equitable powers of the court, rather than a construction of the scope of § 17. In *Hodgson* v. *Sagner, Inc.*, 326 F. Supp. 371, 374 (D. Md. 1971), *aff'd sub nom. Hodgson* v. *Baltimore Regional Joint Board*, 462 F.2d 180 (4th Cir. 1972), the court awarded the Secretary of Labor monetary relief against a union based solely on its outrageous conduct in insisting that an employer divert to its male employees part of the back pay which it had agreed to provide to female victims of discrimination.

In *Northwest Airlines*, 451 U.S. 77, the EEOC argued that its remedies for union violations of the EPA are injunctive relief and "in flagrant cases . . . a Commission suit for damages." EEOC Br. in *Northwest Airlines* at 18, *citing Hodgson* v. *Sagner, Inc.* The EEOC characterized *Sagner* as a case in which "the employer had disgorged the funds unlawfully withheld and was no longer at a competitive advantage, and the fund was misallocated at the union's insistence." *Id.*

Subsequent decisions have consistently declined to read *Sagner* to establish joint liability under § 17 on the part of labor organizations for recovery of unpaid minimum wages and overtime compensation resulting from unlawful collective bargaining agreements. *Northwest Airlines*, 606 F.2d at 1356; *Denicola* v. *G.C. Murphy Co.*, 562 F.2d at 894; *EEOC* v. *Ferris State College*, 493 F. Supp. at 716-17; *Brennan* v. *Emerald Renovators, Inc.*, 410 F. Supp. at 1062; *Dunlop* v. *Beloit College*, 411 F. Supp. at 402.

tion for enforcement of the FLSA or the ADEA. S. Rep. No. 145, 87th Cong., 1st Sess. (1961), *reprinted in* 1962 U.S. CODE CONG. & AD. NEWS 1620, 1659. *See EEOC* v. *Gilbarco, Inc.*, 615 F.2d 985, 988, 991 (4th Cir. 1980) (ADEA); *Donovan* v. *Brown Equipment and Service Tools, Inc.*, 666 F.2d 148, 156 (5th Cir. 1982) (FLSA). *Cf. Wilkes* v. *United States Postal Service*, 548 F. Supp. 642 (N.D. Ill. 1982) (no liquidated damages in federal employee action pursuant to § 15 of the ADEA, 29 U.S.C. § 633a).

C. Section 7(b) of the ADEA Does Not Provide Monetary Remedies in Addition to those Expressly Authorized by the FLSA.

The "selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA." *Lorillard*, 434 U.S. at 582.[38] *Accord EEOC* v. *Gilbarco, Inc.*, 615 F.2d at 987-88 n.1. The creation of a damages remedy against unions is not one of the express modifications to the FLSA remedies enacted in the ADEA.[39]

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[38] The Court noted in *Lorillard* that Congress made three changes in incorporating FLSA remedies into § 7(b) of the ADEA. First, Congress provided equitable relief to employees which was only available in an action by the Secretary under § 17 of the FLSA. 434 U.S. at 581. Second, liquidated damages were restricted to cases of willful violations of the ADEA, in contrast to the automatic award of liquidated damages in a § 16(b) action under the FLSA, which is subject only to the "good faith" defense provided in § 11 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 260. *Id.* at 581 & n.8. Third, the criminal sanctions in § 16(a) of the FLSA, applicable to "any person" who violated § 15 of the act, were deleted from the ADEA. *Id.* at 582.

[39] When Congress has intended to modify the scope of the remedies available against a party in an incorporated statute, it has expressly manifested its intent to do so. For example, in Section 7(a) of the 1978 amendments to Title IV of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801-962 (The Black Lung Benefits Reform Act of 1977) ["Reform Act"], Pub. L. No. 95-239, 92 Stat. 95 (1978) (codified at 30 U.S.C. §§ 901-945), Congress incorporated the remedial scheme of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950, but expressly modified the references to "employer" in the LHWCA to refer to the trustees of the black lung benefits fund. By this substitution of the trustees for the employer, Congress made available an attorney's fees remedy against the fund in black lung benefit claim cases that had not been expressly authorized in LHWCA claim cases. *Compare Director, Office of Workers' Compensation Programs* v. *Black Diamond Coal Mining Co.*, 598 F.2d 945, 948-49 (5th Cir. 1979) *with Director, Office of Workers' Compensation Programs* v. *Robertson*, 625 F.2d 873, 877 n.6 (9th Cir. 1980).

TWA appears to suggest that the general "legal or equitable relief" language in § 7(b)[40] should be read to imply a remedy for recovery of money damages against unions. TWA Br. at 39-40. Yet, § 7(b) expressly defines the monetary remedies for injuries caused by ADEA violations in terms of the remedies provided in § 16 and § 17 of the FLSA: "[a]mounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation *for purposes of sections 216 and 217 of this title* . . . ." 29 U.S.C. § 626(b) (emphasis added).

In *Lorillard*, the Court read the reference to "legal relief" to refer specifically "to judgments 'enforcing . . . liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation,'" 434 U.S. at 583 n.11, *quoting* 29 U.S.C. § 626(b). As TWA admits, "[t]he reference . . . to 'unpaid minimum wages or unpaid overtime compensation' relates to language in the FLSA which has been specifically incorporated into Section 7(b)

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[40] "[A] court 'shall have jurisdiction to grant *such legal* or equitable relief as may be appropriate to effectuate the purposes *of this Act*, including . . . enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.'" TWA Br. at 39-40, *quoting* 29 U.S.C. § 626(b) (emphasis and deletions in original).

of the ADEA." TWA Br. at 40. The Court in *Lorillard* further read § 7(b) as a direction by Congress "that actions for lost wages under the ADEA be treated as actions for unpaid minimum wages or overtime compensation under the FLSA." 434 U.S. at 582. The Court concluded that the reference to "equitable" jurisdiction in § 7(b) was intended to provide equitable remedies in private ADEA actions which were not available in FLSA suits by private individuals, 434 U.S. at 581, rather than as an additional source of "legal relief".[41]

Lower federal court decisions have similarly construed "legal relief" in § 7(b) in terms of the "definition of amounts owing as unpaid minimum wages or unpaid overtime compensation" in § 7(b) and "the reference to sections 216 and 217 of [this] chapter. . . ." *Pfeiffer* v. *Essex Wire Corp.*, 682 F.2d 684, 686 (7th Cir.), *cert. denied*, 459 U.S. 1039 (1982). Thus, in *Johnson* v. *Al Tech Specialties Steel Corp.*, 731 F.2d 143 (2d Cir. 1984), the court declined to read the reference to "legal relief" as "expansive remedial authority," but rather held the provisions deeming " 'amounts owing as a result of a violation [of the ADEA] . . . to be unpaid . . . wages' " "to be dispositive of the drafter's intention" not to provide monetary remedies in § 7(b) in addition to those provided in the FLSA.

[41] The "equitable" relief available under § 7(b) of the ADEA does *not* create a right to recover backpay. In *Lorillard*, this Court concluded that Congress manifested an intent to provide a right to a jury trial by creating a "legal" remedy for lost wages under § 16(b) of the FLSA (which had been construed to provide a right to a jury trial) rather than an equitable "backpay" remedy analogous to Title VII or § 17 of the FLSA (which had been construed *not* to provide a right to a jury trial in actions to recover lost wages). *Lorillard*, 434 U.S. at 580 n.7. Indeed, the court in *Morelock* v. *NCR Corp.*, 546 F.2d 682, 688 (6th Cir. 1976), *vacated and remanded*, 435 U.S. 911 (1978), had erroneously concluded that a jury trial was *not* permitted in a private ADEA action, based on its determination that the ADEA created an equitable backpay remedy rather than a legal remedy.

> [T]he more expansive grant of judicial authority ["such legal or equitable relief"] permits courts in their discretion to supplement back pay awards with injunctive relief, orders of reinstatement or promotion, or similar non-monetary remedies designed to "effectuate the purposes of [the ADEA]"; 29 U.S.C. § 626(b).

731 F.2d at 147.[42]

In any event, even if § 7(b) could be read to provide broader remedies enforcing liability for unpaid minimum and overtime compensation than are available under the FLSA, there is no indication of an intent to expand the *parties* liable for such relief. The grant of jurisdiction to confer "legal or equitable" relief does not support this construction of § 7(b). TWA's argument in reliance on this general language simply goes too far, as it would authorize the courts to grant relief without regard to what is expressly provided in §§ 16 or 17 of the FLSA. This reading of the grant of jurisdiction in the fourth sentence in § 7(b) would render the first three sentences of § 7(b) almost completely superfluous, contrary to the determination in *Lorillard* concerning the "selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices." 434 U.S. at 583.

Ultimately, TWA argues that there is no indication in the legislative history of the ADEA that Congress specifically addressed the issue of remedies for union violations of the ADEA, and that such Congressional silence, in the context of express prohibitions of union violations, is suf-

[42] *See also Fiedler* v. *Indianhead Truck Line, Inc.*, 670 F.2d 806, 810,; *Vazquez* v. *Eastern Airlines, Inc.*, 579 F.2d 107; *Dean* v. *American Security Insurance Co.*, 559 F.2d 1036. *But see EEOC* v. *Air Line Pilots Association, International*, 489 F. Supp. at 1009, holding that the EEOC could recover backpay aaginst ALPA, based on a reading of the general "legal or equitable relief" language in § 7(b) to supersede the "reference in § 626(b) to the FLSA."

ficient to authorize damages remedies. Whatever force that argument may have with respect to statutes where Congress has merely enacted a substantive regulation and left the development of remedies and procedures to the courts, it is unavailing where Congress has manifested its intent to have the courts apply the comprehensive remedies and procedures of an incorporated statutory scheme.[43] By its express incorporation of the remedial scheme of the FLSA into the ADEA, Congress plainly manifested its intent to make § 16 and § 17 of the FLSA the measure of monetary remedies available in ADEA actions. *See Lorillard*, 434 U.S. at 582; *Neuman* v. *Northwest Airlines*, 28 Fair Empl. Prac. Cases (BNA) at 1489. Section 7(b) does not create an additional damages remedy against unions.[44]

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[43] In *La Chapelle* v. *Owens-Illinois*, 513 F.2d 286 (5th Cir. 1975), the Court rejected the argument that the "written consent" requirement for participation in class actions authorized by § 16(b) of the FLSA should not be incorporated in § 7(b) in the absence of a discussion of that issue in the legislative history of ADEA, so as to best effectuate the purposes of the ADEA. 513 F.2d at 289.

> Had Congress desired to read out the [written consent requirement in] the third sentence [of § 16(b)] it could have done so. It has not, and we may not. Any argument that the inclusion of the consent requirement undercuts the broad remedial purposes of ADEA should be made to the legislature and not to the courts.

513 F.2d at 289 n.10.

[44] In describing the provision in the 1978 ADEA amendments expanding the right to a jury trial recognized in *Lorillard*, the House Conference Committee Report reaffirmed that Section 7(b) of the ADEA "incorporates the remedial scheme of Sections 11(b), 16 and 17 of the FLSA," and referred to FLSA caselaw to explain the concept of ADEA liquidated damages. H.R. Conf. Rep. No. 95-950, 95th Cong., 2d Sess. 13-14, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 529, 535. These references to the legal remedies provided in FLSA actions, at a time subsequent to lower court decisions construing § 16 and § 17 of the FLSA not to provide monetary remedies against labor organizations, are additional evidence that the remedies available in ADEA actions are limited to those provided in § 16 and § 17 of the FLSA absent a specific express modification of that FLSA remedial scheme in the ADEA. *Cf. Pfeiffer* v. *Essex Wire Corp.*, 682 F.2d at 687 (finding the legislative history of the 1978 ADEA amendments "highly persuasive, if not dispositive" of Congressional intent to disallow damages beyond what is provided in the remedial scheme of the FLSA). *Accord Brin* v. *Bigsby and Kruthers*, 19 Fair Empl. Prac. Cases (BNA) 415 (N.D. Ill. 1979).

D. The Policy Considerations Offered by TWA Do Not Justify Judicial Fashioning of Additional ADEA Remedies against Labor Organizations.

Unlike § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), on which TWA and employer *amici* rely, neither § 7(b) of the ADEA, nor § 16 and § 17 of the FLSA, expressly provide for monetary relief against a union. This fundamental difference undercuts TWA's suggestion that this Court need only take into account that the substantive prohibitions against union violations in § 4(c) of the ADEA are identical to the prohibitions in § 703(c) of Title VII, 42 U.S.C. § 2000e-2(c), and that the general language concerning appropriate legal and equitable relief in § 7(b) of the ADEA is analogous to general remedial language in § 706(g) of Title VII. Moreover, as this Court specifically emphasized in *Lorillard*, "rather than adopting the procedure of Title VII for ADEA actions, Congress rejected that course in favor of incorporating the FLSA procedure even while adopting Title VII's substantive provisions." 434 U.S. at 584-85.[45]

TWA's analogy to remedies under the judicially implied duty of fair representation is likewise misplaced. As this Court emphasized in holding that punitive damages are not available against a union which breaches its duty of fair representation:

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[45] "[T]he very different remedial and procedural provisions under the ADEA [as contrasted to Title VII] suggest that Congress had a very different intent in mind in drafting the later law." *Lorillard*, 434 U.S. at 585 n.14.

> We are concerned here with judicially created remedies for a judicially implied cause of action. Whether the explicit statutory language of [other statutes] and [their] accompanying legislative history authorize punitive damages awards obviously involves different considerations.

International Brotherhood of Electrical Workers v. *Foust*, 442 U.S. 42, 47 n.9 (1979). The role of the federal courts in creating remedies under the duty of fair representation is "fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt." *Northwest Airlines*, 451 U.S. at 97. "[W]hen Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement," such as the EPA or the ADEA, "[t]he judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs." *Id.*

TWA and employer *amici* further suggest that the policies of the federal labor laws so unambiguously favor judicial recognition of a damages remedy against a labor organization in an ADEA action as to override the express Congressional intent to incorporate the remedies provided in § 16 and § 17 of the FLSA. The fallacy in the overall analysis is demonstrated by TWA's final argument that union liability for *liquidated* damages "follows *a fortiori*" from the "principle of monetary liability." [46] TWA Br. at 43 n.59. The statutory schemes on which TWA relies (Title VII; the Labor Management Relations Act, 29 U.S.C. §§ 141-187; and the Railway Labor Act, 45 U.S.C. §§ 151-188) to establish an abstract "principle of monetary liability" do not provide a liquidated

[46] A "principle of monetary liability" only exists within the context of the statute which creates the prohibition on which that remedy is based. *See Texas Industries, Inc.* v. *Radcliff Materials*, 451 U.S. 630, 642-45 (1981); *Northwest Airlines*, 451 U.S. at 97.

damages remedy. It is absurd to suggest that the federal courts could declare that backpay awards under Title VII can include liquidated damages because Title VII and the ADEA share "'important similarities . . . in their aims and in their substantive prohibitions.'" TWA Br. at 42, *quoting Lorillard*, 434 U.S. at 584. This Court has flatly declined any such invitation to engage in judicial legislation in the guise of statutory construction. *Northwest Airlines*, 451 U.S. at 97.

It is for Congress to determine the scope of relief for violations of the prohibitions it enacts, and to strike the balance between those remedies which will most precisely further compliance and those that will overly harm legitimate competing values.[47] The different statutory schemes implicated in this case reflect various Congressional resolutions of these issues. In the FLSA, Congress made it unlawful for employers, but not labor organizations, to enter into collective bargaining agreements which violate § 6(a) and § 7 of that Act,[48] and provided for recovery of unpaid wages as well as double damages and criminal sanctions as remedies. Title VII creates an express backpay remedy against employers *and* labor organizations which violate the Act, but it makes the back-

[47] *See generally, Texas Industries*, 451 U.S. at 635, 637 (determining "whether sharing of damages liability will advance or impair the objectives of the antitrust laws" requires consideration of the "problem of 'overdeterrence,' i.e., the possibility that severe antitrust penalties will chill wholly legitimate business agreements.")

[48] The FLSA, which was designed to give specific minimum protections to individual workers and to ensure that each employee covered by the Act would receive "'[a] fair day's pay for a fair day's work'" and would be protected from "the evil of 'overwork' as well as 'underpay,'" *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981), prohibits employers, but not unions, from entering into collective bargaining agreements contrary to § 6 and § 7 of the FLSA. 450 U.S. at 740-41, and cases cited therein.

pay award discretionary and provides neither criminal sanctions nor liquidated damages. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975); *Lorillard*, 434 U.S. at 584 & n.13.[49]

The perceived "unfairness" of different balances of economic interests embodied in different statutory schemes may not be adjusted by judicial selection of the most reasonable provisions of arguably analogous statutes. "The equitable considerations advanced by petitioner are properly addressed to Congress, not to the federal courts. Congress is best able to evaluate these policy considerations." *Northwest Airlines*, 451 U.S. at 98 n.41. *Accord Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 646-47 (1981). *See generally Diamond* v. *Chakrabarty*, 447 U.S. 303, 317 (1980) ("balancing of competing values and interests . . . in our democratic system is the business of elected representatives," not the courts).

TWA argues that differences between the purposes of the FLSA and the ADEA, and the limited "applicability of the FLSA to unions," "explains why it is only logical for some of the remedies under the FLSA to differ from those of the ADEA." TWA Br. at 41. This argument, even if correct, would not justify judicial creation of a new remedy in a comprehensive remedial scheme. Moreover, TWA's conclusion does not logically follow even if the premises were true. For example, each statutory scheme prohibits both union and employer retaliation against an employee who participates in enforcement proceedings (*compare* 29 U.S.C. § 215(a)(3) *with* 29 U.S.C. § 623(d)); the purposes underlying these provisions are identical, but the scope of remedies and enforcement procedures differ greatly. Likewise, the EPA,

[49] It was precisely such differences in the remedial schemes that led the Court in *Lorillard* to conclude that Title VII "sheds no light on congressional intent" in construing the remedial scheme of ADEA. *Lorillard*, 434 U.S. at 585.

the ADEA, and Title VII prohibit employer discrimination in violation of each act,[50] yet Congress selected different remedies for employer violations of these similar provisions.

Moreover, TWA's premise of the FLSA's "limited applicability" to unions does not bear close inspection. Where the majority of employees in a bargaining unit represented by a union prefer some other economic benefit to statutory overtime compensation, a union may attempt to bargain for and obtain an agreement in violation of §7 of the FLSA.

> Since a union's objective is to maximize overall compensation of its members, not to ensure that each employee receives the best compensation deal available . . . a union balancing individual and collective interests might validly permit some employees' statutorily granted wage and hour benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole.

Barrentine v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 742 (1981) (citations and footnotes omitted).

While a union might attempt to negotiate for mandatory retirement of older employees,[51] it might also seek to trade wage increases or other benefits favoring younger employees to secure improved retirement benefits.[52] TWA has no basis to assume that any one of these situations is more or less likely to occur than another. Nor is it the proper role of the courts to engage in speculation con-

[50] *Compare* § 6(d)(1) of the FLSA, 29 U.S.C. § 206(d)(1) *with* § 4(a) of the ADEA, 29 U.S.C. § 623(a), and § 703(a) of Title VII, 42 U.S.C. § 2000e-2(a).

[51] *See, e.g., McMullans* v. *Kansas, Oklahoma and Gulf Railroad*, 229 F.2d 50 (10th Cir.), *cert. denied*, 351 U.S. 918 (1956).

[52] *See Buchholtz* v. *Swift & Co.*, 609 F.2d 317, 319, 327-28 (8th Cir. 1979).

cerning such legislative facts as whether collective bargaining agreements are more or less likely to violate the wage and hour provisions of the FLSA than the prohibitions of the ADEA. *See generally Texas Industries* v. *Radcliff Materials*, 451 U.S. at 646-47.

The "extensive fact-finding undertaken by the Executive Branch and Congress" in enacting the ADEA, *EEOC* v. *Wyoming*, —— U.S. ——, 103 S.Ct. 1054, 1057 (1983), does not support TWA's premise.[53] While the

[53] TWA, and employer *amici*, do not refer to any portion of the Congressional hearings, or any other aspect of the legislative history prior to the enactment of the ADEA, in which Congress was presented with evidence that unions played a substantial role in promoting or maintaining arbitrary age discrimination practices. The Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* ("Report"), a significant element in the fact-finding process leading to the enactment of the ADEA, *EEOC* v. *Wyoming*, 103 S.Ct. at 1058, focused on employer attitudes and practices, and only referred to collective bargaining as a significant factor in retirement plans and seniority systems. Report at 21-46, 53-61. With respect to the former, Congress decided not to prohibit mandatory retirement pursuant to a bona fide employee benefit plan, notwithstanding union objections to that exemption. *United Air Lines, Inc.* v. *McMann*, 434 U.S. 192, 202 (1977). With respect to seniority rights, the Report emphasized the advantages of seniority to incumbent older workers and the central role of unions in developing seniority rights. Report at 54, 57-59.

In stark contrast, the legislation that ultimately emerged as Title VII was based on hearings in which voluminous evidence was presented to Congress which implicated labor unions in racial discrimination in employment, most notably in union hiring halls and apprenticeship training programs in the construction industry. *See* H.R. Rep. No. 570, 88th Cong., 1st Sess. 2, 3 (1963); S. Rep. No. 867, 88th Cong., 2d Sess. 5, 6, 11, 22 (1963); *Equal Opportunity in Employment: Hearings on H.R. 405 and Similar Bills Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 88th Cong., 1st Sess. 20, 21, 66-69, 71-72, 97-98, 142-55, (1963); *Equal Opportunity in Employment: Hearings on S. 773, 1210, 1211, 1937 Before the Subcomm. on Employment and Man-*

statement of the representative of the AFL-CIO acknowledged that the ADEA prohibited age discrimination by unions, he also affirmed that:

> [t]he labor movement, through its international and local unions, has consistently been in the forefront of efforts to deal with the problems of older workers. In collective bargaining agreements we have endeavored to deal with some of the problems of age discrimination in employment, and in Convention resolutions we have called attention to the need for legislation, at both the state and Federal levels, to prevent such discrimination.

Age Discrimination in Employment: Hearings on H.R. 3651, 3768, 4221 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 95th Cong., 1st Sess. 418 (1967) (statement of Kenneth A. Meiklejohn, Legislative Representative, AFL-CIO). The subsequent enforcement history of the ADEA adds little to the original Congressional factfinding: aside from cases involving the impact of the FAA Age 60 Rule on flight deck crew working conditions, only eight reported cases since the enactment of the ADEA have involved labor organization defendants.[54]

TWA's policy arguments, plainly do not provide a more reliable guide to statutory construction than the Congres-

power of the Senate Comm. on Labor and Public Welfare, 88th Cong., 1st Sess. 158-67, 178, 199-200, 401-02 (1963).

[54] *de Loraine* v. *MEBA Pension Trust*, 499 F.2d 49 (2d Cir. 1974); *Moon* v. *Aeronca, Inc.*, 541 F. Supp. 747 (S.D. Ohio 1982); *Rodgers* v. *Grow-Kiewit Corp.*, 93 Lab. Cas. (CCH) ¶ 13,431 (S.D.N.Y. 1981); *Rhoades* v. *Book Press*, 458 F. Supp. 674 (D. Vt. 1978); *Balc* v. *United Steelworkers*, 6 Fair Empl. Prac. Cases (BNA) 824 (W.D. Pa. 1973); *Chaudoin* v. *ALPA*, 6 Fair Empl. Prac. Cases (BNA) 107 (D.D.C. 1973); *Hart* v. *United Steelworkers*, 350 F. Supp. 294 (W.D. Pa. 1972), *vacated as moot*, 482 F.2d 282 (3d Cir. 1973); *Kincaid* v. *United Steelworkers*, 5 Fair Empl. Prac. Cases (BNA) 235 (N.D. Ind. 1972). None of these cases resulted in findings of union violations of the ADEA.

sional choices embodied in the statutory language of § 7 (b) incorporating the remedial scheme of the FLSA into the ADEA.

CONCLUSION

For all the foregoing reasons and those set forth in the brief of ALPA as petitioner in No. 83-1325, the judgment of the United States Court of Appeals for the Second Circuit should be vacated to the extent that it holds that ALPA and TWA violated the ADEA; or, in the alternative, that portion of the judgment that holds that ALPA is not responsible for damages to any of the plaintiffs should be affirmed.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

AGE DISCRIMINATION IN EMPLOYMENT ACT

Section 4, 29 U.S.C. § 623, Prohibition of Age Discrimination:

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

* * * *

(c) It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be unlawful for an employer to discriminate against any of his employees or applicants

for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

Sections 7(b), 29 U.S.C. § 626(b), (c), Enforcement:

(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged,

and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c)(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

FAIR LABOR STANDARDS ACT

Sections 3(a), (b), 29 U.S.C. § 203(a), (b), Definitions:

As used in this chapter—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

Section 6, 29 U.S.C. § 206, Minimum Wage:

(a) Every employer shall pay to each of his employees who in any workweek is engaged in com-

merce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section;

(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employ-

ers, agents, contractors, and subcontractors shall cause goods to be produced by home workers;

(3) if such employee is employed in American Samoa, in lieu of the rate or rates provided by this subsection or subsection (b) of this section, not less than the applicable rate established by the Secretary of Labor in accordance with recommendations of a special industry committee or committees which he shall appoint in the same manner and pursuant to the same provisions as are applicable to the special industry committees provided for Puerto Rico and the Virgin Islands by this chapter as amended from time to time. Each such committee shall have the same powers and duties and shall apply the same standards with respect to the application of the provisions of this chapter to employees employed in American Samoa as pertain to special industry committees established under section 205 of this title with respect to employees employed in Puerto Rico or the Virgin Islands. The minimum wage rate thus established shall not exceed the rate prescribed in paragraph (1) of this subsection;

(4) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement); or

(5) if such employee is employed in agriculture, not less than the minimum wage rate in effect under paragraph (1) after December 31, 1977.

* * * *

(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which

exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Section 7, 29 U.S.C. § 207, Maximum Hours:

(a) (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified

at a rate not less than one and one-half times the regular rate at which he is employed.

(b) No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty-hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) of this section or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if—

(A) the annual gross volume of sales of such enterprise is less than $1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale,

and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 206 of this title, and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed.

* * * *

(f) No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees,

if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

Section 11(a), 29 U.S.C. § 211(a), Inspections:

(a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter. Except as provided in section 212 of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 212 of this title, the Administrator shall bring all actions under section 217 of this title to restrain violations of this chapter.

Section 15(a)(2), (3), 29 U.S.C. § 215(a)(2), (3), Prohibited Acts:

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

* * * *

(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

* * * *

Section 16, U.S.C. § 216, Penalties; Civil and Criminal Liability; Injunction Procedures Terminating Right of Action; Waiver of Claims; Actions by Secretary of Labor:

(a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief

as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of this action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

(c) The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or section 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determin-

ing when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

Section 17, 29 U.S.C. § 217, Injunction Proceedings:

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 255 of this title).

TITLE VII, CIVIL RIGHTS ACT OF 1964

Section 703(c), 42 U.S.C. § 2000e-2(c), Unlawful Employment Practices:

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 706(g) 42 U.S.C. § 2000e-5(g), Enforcement Provisions:

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring,

reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.